

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN J. YOUNG and ENVIRONMENTAL PROTECTION AGENCY,
PESTICIDES PROGRAM, Atlanta, GA

*Docket No. 03-2016; Submitted on the Record;
Issued November 3, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he had no continuing disability resulting from the accepted work injury; and (2) whether the Office properly refused to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a).

This is the second appeal in the present case. In a January 25, 2002 decision, the Board set aside the Office's decision dated August 19, 1998 and remanded the case for further development to determine whether appellant's work-related aggravation of his allergic reaction was permanent or temporary, and if temporary, when such condition ended. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.¹

On remand, the Office referred appellant for evaluation by Dr. Mark D. Livezey, a Board-certified allergist. In a report dated June 26, 2002, Dr. Livezey diagnosed mild perennial allergic rhinitis. He noted that the spirometry test was within normal limits and that physical examination revealed no abnormalities. Dr. Livezey advised that the skin test was positive for dust mites and exhibited a feature of allergic rhinitis. He further noted that appellant had a hypereactivity or increased sensitivity to a variety of allergic or nonallergic influences in the environment. Appellant reported an overall improvement in his condition and a reduction of symptoms since leaving the employing establishment. Dr. Livezey noted that, while multiple chemical sensitivity syndromes has been described in the literature, it had not been accepted by most allergists as a distinct and definite disease entity because of an inability to establish a path or physiologic basis for why exposure in the remote past should continue to lead to intermittent

¹ Docket No. 99-1678 (issued January 25, 2002). The Office accepted appellant's claim for temporary aggravation of allergic reaction and advised him in a letter dated April 6, 1992 that he was entitled to compensation for wage loss for one week beyond the date he was last exposed to factors of employment. Appellant retired on July 14, 1990.

symptoms in the present. He advised that appellant's allergic sensitivities to dust mites, and perhaps other allergens, led to an increased sensitivity to nonallergic agents and, therefore, could not be attributable to his federal employment. Dr. Livezey also noted that appellant did not currently have airway reactivity as a result of his federal employment and that the irritant within his environment ended when appellant left that environment. Dr. Livezey concluded that he did not believe appellant's work environment precipitated long-standing disabling symptoms and that appellant's underlying allergic sensitivity to the common dust mite allergen would have made him more sensitive to other nonallergic influences on a temporary basis.

By decision dated August 20, 2002, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his current condition or continuing disability was caused by the employment factor.

In a letter dated May 1, 2003, appellant requested reconsideration. While appellant did not submit any additional evidence, he argued that the Office erred in relying on Dr. Livezey's June 26, 2002 report.

In a decision dated May 12, 2003, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was irrelevant in nature and insufficient to warrant review of the prior decision.

The Board has carefully reviewed the case record and finds that the Office met its burden of proof in terminating appellant's disability compensation.

Under the Federal Employees' Compensation Act when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.² When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased,³ even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.⁴

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.⁵ Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.⁶

The fact that the Office accepted appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden

² *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

³ *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁴ *John Watkins*, 47 ECAB 597 (1996); *Marion Thornton*, 46 ECAB 899, 906 (1995).

⁵ *William Kandel*, 43 ECAB 1011, 1020 (1992).

⁶ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

is on the Office to demonstrate an absence of employment-related disability during the period subsequent to the date when compensation is terminated or modified.⁷ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The Board finds that the medical evidence establishes that appellant's accepted work-related temporary aggravation of allergic reaction has long since resolved and that he has no residuals of the accepted injury. Under the circumstances of this case, the opinion of Dr. Livezey is sufficiently well rationalized and based upon a proper factual background such that it represents the weight of the evidence. In his report dated June 26, 2002, Dr. Livezey diagnosed mild perennial allergic rhinitis. He noted that the spirometry test was within normal limits and that the physical examination revealed no abnormalities. Dr. Livezey advised that appellant's allergic sensitivities to dust mites and other allergens led to an increased sensitivity to nonallergic agents and were not attributable to his employment. He noted that appellant did not currently have airway reactivity as a result of his federal employment and that the irritant within his environment ended when appellant left that environment. Dr. Livezey concluded that he did not believe appellant's work environment precipitated long-standing disabling symptoms and that his underlying allergic sensitivity to the common dust mite allergen would have made him more sensitive to other nonallergic influences on a temporary basis. Dr. Livezey indicated that appellant did not suffer work-related residuals from the condition of temporary aggravation of allergic reaction. He noted that the work-related condition was resolved. Appellant did not submit any medical evidence refuting Dr. Livezey's opinion.

The Board finds that Dr. Livezey's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits. For these reasons, the Office met its burden of proof in terminating appellant's compensation benefits.

The Board further finds that the Office properly denied appellant's request for reconsideration.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (i) showing that the Office erroneously applied or interpreted a specific point of law; (ii) advancing a relevant legal argument not previously considered by the Office; or (iii) submitting relevant and pertinent new evidence not previously considered by the Office.⁹ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

⁷ *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

⁸ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995); *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁹ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁰ 20 C.F.R. § 10.608(b) (1999).

Appellant's May 1, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. In his request, appellant raised several issues regarding the Office's reliance on Dr. Livezey's June 26, 2002 report. However, appellant's arguments do not satisfy the criteria under section 10.606(b)(2)(i) and (ii). Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any relevant and pertinent new evidence along with his May 1, 2003 request for reconsideration.¹¹ Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's May 1, 2003 request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated May 12, 2003 and August 20, 2002 are hereby affirmed.

Dated, Washington, DC
November 3, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹¹ Although appellant stated that he intended to submit additional evidence and arguments, no such information was received by the Office prior to the issuance of the May 12, 2003 decision denying reconsideration.